Supreme Court, U.S.
FILED
OCT 14 1998
CLERK

(3)

No. 98-217

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

PARK VILLAGE APARTMENTS,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PARK VILLAGE

ROBERT L. GORMAN
Counsel of Record
LAW OFFICES OF ROBERT L. GORMAN
44 Montgomery Street, Suite 4210
San Francisco, CA 94104
(415) 986-6697
Attorney for Petitioner
Park Village Apartments

Bowne of San Francisco, Inc., Law Printers (415) 362-2300

14 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I.

SINCE THE TRIAL COURT DID NOT PERMIT ADJUSTMENTS OF PARK VILLAGES'S RENTS TO RESULT IN THE STATUTORILY FORMULATED "MAXIMUM MONTHLY RENT," THE TRIAL COURT DID NOT PROPERLY APPLY THE CONTRACT'S OVERALL LIMITATION PROVISION 1

II.

HUD ASSERTS THAT THE TRIAL COURT'S DECISION IS NOT "IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS." A REVIEW OF THIS COURT'S DECISION IN *ALPINE RIDGE* AND OF THE APPELLATE COURT'S DECISION IN *NATIONAL LEASED HOUSING* SHOWS THAT THE TRIAL COURT'S DECISION CONFLICTS WITH BOTH 4

TABLE OF CONTENTS

Page

III.

THE TRIAL COURT'S DECISION THAT OWNERS ARE NOT ENTITLED TO PAYMENT OF THE INITIAL DIFFERENCE ABOVE COMPARABLE RENTS IS IN CONFLICT WITH THE APPELLATE COURT'S DECISION IN *NATIONAL LEASED HOUSING* WHICH REQUIRES HUD TO MAINTAIN PAYMENT OF THE INITIAL DIFFERENCE 7

IV.

HUD FLAGRANTLY MISSTATES THAT "BASED ON ESTABLISHED HUD PRACTICE, THE TRIAL COURT DETERMINED THAT 'THE OVERALL LIMITATION WOULD BE TRIGGERED ONLY WHEN THE [MARKET RENTS] ARE AT LEAST 20 PERCENT HIGHER THAN THE [AAF]-BASED CONTRACT RENT.'" 8

V.

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Page

Cisneros v. Alpine Ridge Group, 508 U.S. 10, 113 S. Ct. 1898, 123 L.Ed. 572 (1993) ..2, 3, 4, 5, 6, 8

National Leased Housing Ass'n v. United States, 105 F.3d 1423 (Fed. Cir. 1997) 4, 6, 7, 8

Statutes

Housing Act of 1937, as amended by Public Law 383, Title II, Sec. 201, the Housing and Community Development Act of 1974, and codified at 42 U.S.C. § 1437f:

§ 8(c)(1), 42 U.S.C. § 1437f(c)(1) 1, 3, 9, 10

§ 8(c)(2)(A), 42 U.S.C. § 1437f(c)(2)(A) 1, 2

REPLY BRIEF FOR PARK VILLAGE

I.

SINCE THE TRIAL COURT DID NOT PERMIT ADJUSTMENTS OF PARK VILLAGE'S CONTRACT RENTS TO RESULT IN THE STATUTORILY FORMULATED "MAXIMUM MONTHLY RENT," THE TRIAL COURT DID NOT PROPERLY APPLY THE CONTRACT'S OVERALL LIMITATION PROVISION

In its brief in opposition, HUD's proposed "question presented" is whether the Court of Federal Claims' decision properly applied the Contract Rent provision limiting the annual adjustments. Since the trial court's decision did not permit adjustments of Park Village's Contract Rents to result in the statutorily formulated "maximum monthly rent," the trial court did not properly apply the Contract's Overall Limitation on rent adjustments.

Subsection (c)(1) of the statute, 42 U.S.C. § 1437(f), provides that the contract shall establish the "maximum monthly rent". Pet. App. 109a. The word "maximum" signals an upper limit on the amount of monthly Contract Rent that is statutorily permissible. The word "maximum", therefore, assures the payor (i.e., HUD) an upper limit on the amount of monthly rent it is obligated to pay under the contract. Subsection (c)(1) of the statute provides that "the owner is entitled to receive" this same "maximum monthly rent." Pet. App. 109a. Thus the statute's "maximum monthly rent" is also the statute's minimum monthly rent.

Subsection (c)(1) of the statute provides that the "maximum monthly rent shall not exceed" the fair market rent by more than 20%. Pet. App. 109a. The statute, at Subsection (c)(2)(A), referring to the "maximum monthly rent" in Subsection (c)(1), mandates that the annual adjustment of the "maximum monthly rents" shall be made to reflect

changes in the market rents.[1] Pet. App. 110a. Subsection (c)(2)(A) makes clear that owners, with each annual adjustment, are entitled to the "maximum monthly rent" that reflects "changes in the fair market rentals." Because the initial rental premium is an integral portion of the "maximum monthly rent," the dollar amount of the premium must also change proportionately, not remain fixed, as the trial court decided. Pet. App. 23a.

The Supreme Court in *Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 15, 113 S.Ct. 1898, 1901, 123 L.Ed. 2d 572 (1993) ("Alpine Ridge") stated that Subsection (c)(2)(A) provides "two alternative approaches" for annually adjusting Contract Rents. The Supreme Court described the first alternative as a "market survey", and the second alternative as a "reasonable formula". *Alpine Ridge,* 508 U.S. at 15, 113 S.Ct. at 1901. Since the sole purpose of both of the alternative adjustments, according to Subsection (c)(2)(A), is to maintain the "maximum monthly rents," the owner is entitled to whichever of the alternative adjustments ensures payment of the "maximum monthly rent." Pet. App. 110a. Conforming with the statutory scheme at Subsection (c)(2)(A), the contract at § 1.8(b) provides for automatic annual adjustments based on a "reasonable formula," and at § 1.8(d) the contract provides for a comparability study, which is what the Supreme Court in *Alpine Ridge* calls a "market survey."

The Supreme Court made clear that when the formula adjustments pursuant to § 1.8(b) of the contract, which it referred to as the "presumptive adjustment called for under the Contract," failed to accurately reflect fair market rents of comparable unassisted units, a comparability study under

---

[1] In Park Village's case, errant formula adjustments (i.e., the AAAFs) resulted in Park Village's Contract Rents being less than the "maximum monthly rent" to which it was entitled. (Compare the charts on Pet. App. 17a and 28a.)

the Overall Limitation provision at 1.8(d) "would ensue." *Alpine Ridge,* 508 U.S. at 19, 113 S.Ct. at 1904. The rents found by the comparability study would cap and limit the rents HUD would pay, superseding the formula adjustments, which are based on trends. *Alpine Ridge,* 508 U.S. at 13-14, 19, 20, 113 S.Ct. at 1434, 1904. By holding that the rents found by comparability studies would "cap" and "limit" the rents HUD must pay, the Court in effect is stating that the rents found by those studies are deemed to be the "maximum monthly rents."

With due respect to this Court's decision in *Alpine Ridge,* in which this Court did not consider the initial difference referred to in the proviso clause of the contract's Overall Limitation because it was not asked to, *capping* and *limiting* Contract Rents to the rents indicated by comparability studies does not necessarily result in the "maximum monthly rent" envisioned by the statute at Subsection (c)(1). By authority of Subsection (c)(1), HUD applied a premium to the rents it found comparable when establishing Park Village's initial Contract Rents, and it is this premium that the proviso mandates shall not be prohibited. The evidence established that Park Village's initial Contract Rents were the product of the rents paid for comparable unassisted units, multiplied by a factor of 1.15.[2] Therefore, the only proper way for the trial court to have applied the contract's Overall Limitation provision was to have increased Park Village's rents to the rents determined by HUD's comparability study (which was adopted by the trial court) by a factor of 1.15%. The purpose of the Overall Limitation provision is to re-establish "maximum monthly rents," where Contract Rents have been erroneously adjusted by the AAAFs referred to in § 1.8(b) of the contract. But instead of increasing Park Village's Contract Rents, which were erroneously adjusted by the AAAFs, to the rents

---

[2]See footnote 2 on page 6 of Park Village's petition for certiorari.

determined by HUD's comparability study, and multiplying those rents so determined by a factor of 1.15, the trial court held that Park Village must accept the Contract Rents that were so erroneously adjusted by the AAAFs that they were below the rents of comparable unassisted units (i.e., market rents) as determined by HUD's comparability study.

II.

HUD ASSERTS THAT THE TRIAL COURT'S DECISION IS NOT "IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS"[3]. A REVIEW OF THIS COURT'S DECISION IN *ALPINE RIDGE* AND OF THE APPELLATE COURT'S DECISION IN *NATIONAL LEASED HOUSING* SHOWS THAT THE TRIAL COURT'S DECISION CONFLICTS WITH BOTH.

A review of this court's decision in *Alpine Ridge* shows that the trial court's decision is, in fact, in conflict the Supreme Court's decision on two issues: the Supreme Court tacitly held (1) that owners are entitled to rents based upon comparability studies when the Overall Limitation is invoked; and (2) that those comparability studies must be based on the rents actually paid for unassisted units which are found to be comparable to the assisted units, and not based on rental trends.

1. The Supreme Court, in the following statement, tacitly held that owners are entitled to the rents determined by a comparability study conducted under the Overall Limitation:

> "Even if it could be demonstrated that HUD's studies have been unreliable, this would in no way suggest that the contract forbids HUD from capping rents based on

---

[3]HUD's opposition brief, p. 4.

> accurate and fair comparability studies. If respondents have been denied formula-based rent increases based on shoddy comparisons, their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons. (*Alpine Ridge*, 508 U.S. at 20-21, 113 S.Ct. at 1904.)

By stating that owners have a right "to challenge" the accuracy of HUD's comparability study, but not to challenge HUD's right to perform a comparability study, the Supreme Court tacitly held that owners have a contract right to the rents determined by a comparability study if that study is not challenged. However, if the owner challenges HUD's study with another study showing HUD's to be inaccurate and unfair, then the Supreme Court is saying that the owner would be entitled to the rents indicated by the more accurate study. In either case, owners would be entitled to rents determined by comparability studies under the Overall Limitation.

The Federal Court of Claims, in conflict with the Supreme Court's tacit holding above, held that owners are not entitled to the rents resulting from comparability studies, but must accept AAAF adjustments resulting in rents less than the rents of comparable unassisted units if those AAAF adjustments do not result in Contract Rents more than 20% less than the rents paid for comparable unassisted units. Pet. App. 14a-15a, 23a-28a.

2. On the issue of the standard for determining rents under the contract's Overall Limitation provision, the Supreme Court, below, made clear that only the rents of unassisted units that are found to be comparable to the assisted units will be the criteria for determining the rents of

the assisted contract units, when formula adjustments, based on rental trends, are suspect.

> "The rent adjustments indicated by the automatic adjustment factors remain the presumptive adjustment called for under the contract. It is only in those presumably exceptional cases where the Secretary has reason to suspect that the adjustment factors are resulting in materially inflated rents that a comparability study would ensue. Because the automatic adjustment factors are themselves geared to reflect trends in the local or regional housing market, theoretically it should not be often that the comparability studies would suggest material differences between Section 8 and private-market rents." (*Alpine Ridge*, 508 U.S. at 19-20, 113 S.Ct. at 1904.)

Above, the Supreme Court is indicating the fallibility of rent determinations based upon trends — i.e., the automatic adjustment factors. When such a trend-based adjustment is suspect, a comparability study will ensue, forcing the suspect trend-based adjustment to give way to the rents determined by that comparability study. The comparability study is made of three to five units that are "considered comparable to the Section 8 building" (*Alpine Ridge*, 508 U.S. at 14, 19, 113 S.Ct. at 1901, 1904), and those rents that are found by such a comparability study will be the basis for the Contract Rent adjustment.

Despite the requirement of the contract's Overall Limitation provision, the trial court adopted an appraisal report based upon trends rather than one based upon a comparability study. Pet. App. 16a.

Relying on the *Alpine Ridge* decision on the first issue above, the Federal Circuit Court of Appeals in *National Leased Housing Ass'n v. United States*, 105 F.3d 1423, 1434 (Fed. Cir. 1997) ("*National Leased Housing*"), Pet. App.

100a-101a, also indicated that owners are entitled to the rents determined by comparability studies but implied, by way of its footnote 14, that owners would also be entitled to the initial difference above comparable rents, if an initial difference in fact existed, with respect to the owner's initial Contract Rents. *National Leased Housing*, 105 F.3d at 1434, n. 14; Pet. App. 101a, n. 14.

III.

THE TRIAL COURT'S DECISION THAT OWNERS ARE NOT ENTITLED TO PAYMENT OF THE INITIAL DIFFERENCE ABOVE COMPARABLE RENTS IS IN CONFLICT WITH THE APPELLATE COURT'S DECISION IN NATIONAL LEASED HOUSING WHICH REQUIRES HUD TO MAINTAIN PAYMENT OF THE INITIAL DIFFERENCE.

The Federal Circuit Court of Appeals in *National leased Housing* agreed with the trial court that the initial difference is to be treated as a fixed dollar amount rather than a percentage amount. However, the Court of Appeals did not view the initial difference as a gauge to determine if a material difference existed under the first clause of the Overall Limitation. Instead, the Court of Appeals unequivocally stated that the initial difference must be maintained above the rents "determined by the comparability study":

> "Thus, if the original contract rent was $500 and the rent of a comparable unassisted unit was $400, HUD is required to maintain a $100 difference between the adjusted rent and the rent of a comparable unassisted unit, as determined by the comparability study." (*National Leased Housing*, 105 F.3d at 1435; Pet. App. 102a.)

On page 6 of its opposition brief, HUD asserts that the passage quoted above from *National Leased Housing*

"merely describes — by way of a hypothetical — the litigating position of a party." The hypothetical expressed HUD's position, which the Court of Appeals in *National Leased Housing* affirmed. *National Leased Housing,* 105 F.3d at 1434-1435; Pet. App. 101a-103a.

The Supreme Court in *Alpine Ridge,* as stated in Park Village's petition, was not asked by either HUD or the Alpine Ridge Group to consider the initial difference referred to in the proviso, much less whether it was to be implemented as a percentage increasing comparable rents or a fixed dollar amount added to comparable rents, but is now petitioned to do so.

IV.

HUD FLAGRANTLY MISSTATES THAT "BASED ON ESTABLISHED HUD PRACTICE, THE TRIAL COURT DETERMINED THAT 'THE OVERALL LIMITATION WOULD BE TRIGGERED ONLY WHEN THE [MARKET RENTS] ARE AT LEAST 20 PERCENT HIGHER THAN THE [AAF]-BASED CONTRACT RENT.' "[4]

HUD, on page 17 of its post-trial brief, dated June 17, 1994, admitted that it "*never* developed a policy statement [i.e., HUD never had an "established practice"] for determining when a material difference existed in this reverse situation." This "reverse situation" is where the AAAF-adjustments result in Contract Rents *less* than those determined by comparability studies to be market rents. In its post-trial brief at page 17, HUD stated:

> "A HUD memorandum dated January 14, 1986, advised all of HUD's regional directors of housing that . . . a material difference exists whenever the ad-

[4]HUD's opposition brief, page 3.

> justed Section 8 rent would exceed 120 percent times the sum of the comparable rent and the initial difference."

In its post-trial brief at page 17, HUD went on to admit that:

> "This definition of material difference refers [only] to those situations in which the AAF (factored) rent would exceed the comparable rent. HUD did not anticipate that the overall limitation provision would be applicable to those situations in which the comparable rent would exceed the factored rent."

The definition of "material difference" in HUD's January 14, 1986 memorandum, which refers only to situations in which AAAF-adjusted rents exceed 120 percent of the sum of the comparable rent and the initial difference, does not logically lead to the inference that *under*-adjustments of the Contract Rents by the AAAFs (i.e., where the AAAF adjustments result in rents less than market rents increased by the initial difference) permit HUD to deny owners the rents of comparable unassisted units increased by the initial difference. It is, after all, the rents of comparable unassisted units increased by the initial difference that the statute at Subsection (c)(1) refers to as the "maximum monthly rent," to which the owners are entitled.

V.

CONCLUSION

This petition should be granted, and this Court should then reverse the Court of Appeals' decision so as to ensure that when the Overall Limitation is invoked both HUD and the owners are equally protected. Not only will HUD not be required to pay more than comparable rents and the initial difference, but also owners will not be required to accept less than comparable rents and the initial difference, i.e., the

statutory "maximum monthly rent" at Subsection (c)(1). Pet. App. 109a.

October, 1998

Respectfully submitted,

Robert L. Gorman
Counsel of Record
LAW OFFICES OF
ROBERT L. GORMAN
44 Montgomery Street,
Suite 4210
San Francisco, CA 94104
(415) 986-6697
Attorney for Petitioner
Park Village Apartments